

IN SENATE  
COMMITTEE ON THE UNITED STATES

HOUSE OF REPRESENTATIVES

81

FRED B. JOHNSON, LEGAL GUARDIAN OF KATHLEEN  
KONSTOVNIK, WIDOW, PLAINTIFF IN ERROR

THE UNITED STATES OF AMERICA

IT APPEARS TO THE DISTRICT COURT OF THE UNITED STATES FOR  
THE DISTRICT OF COLUMBIA, TRANSMITTED FROM THE  
UNITED STATES DISTRICT COURT OF DISTRICT OF COLUMBIA FOR THE FOURTH  
CIRCUIT OF THE DISTRICT OF COLUMBIA, ACCORDING TO THE  
ACTS OF CONGRESS

Adm. Div. 8-1944

Adm. Div. 8-1944

(S. 800)

226  
/502

(29,605)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 323

FRED N. CROUCH, LEGAL GUARDIAN OF KATHLEEN  
KONSTOVICH, WIDOW, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES OF AMERICA

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR  
THE EASTERN DISTRICT OF VIRGINIA, TRANSFERRED FROM THE  
UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH  
CIRCUIT UNDER THE ACT OF CONGRESS APPROVED SEPTEMBER  
14, 1922

INDEX

	Original	Print
Record from U. S. district court for the eastern district of		
Virginia .....	1	1
Caption .....	1	1
Petition .....	1	1
Answer .....	4	4
Order filing amended answer.....	7	7
Amended answer.....	8	8
Order continuing cause.....	10	10
Findings of fact and conclusions of law.....	10	10
Order of judgment.....	12	12
Assignment of errors.....	13	13
Stipulation as to what the record shall consist.....	13	13

	Original	Print
Memorandum of original papers accompanying transcript..	14	14
Certificate of the clerk.....	15	15
Proceedings in C. C. A.....	17	16
Order extending time.....	17	16
Notation as to exhibits.....	18	16
Appearances .....	18	17
Order transferring cause to supreme court.....	18	17
Clerk's certificate.....	20	17
Record in the U. S. district court.....	21	18
Petition for writ of error.....	21	18
Order allowing writ of error.....	23	18
Bond on writ of error..... (omitted in printing) ..	25	19
Writ of error.....	27	19
Citation and service.....	29	20

# TRANSCRIPT OF RECORD

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UNITED STATES OF AMERICA,  
Eastern District of Virginia, ss:

At a District Court of the United States for the Eastern District of Virginia, begun and held in the Court Room in said Court, in the Court House and Post Office Building in the City of Norfolk, Virginia, on the first Monday in November, being the Seventh day of the same month, in the year of our Lord One Thousand Nine Hundred and Twenty-One.

Present: The Honorable Edmund Waddill, United States Circuit Judge.

Among other were the following proceedings, to-wit:

Fred N. Crouch, Legal Guardian  
of Kathleen Konstovich,

against

The United States of America.

## PETITION

(2) Filed December 17th, 1921.

To the Honorable D. Lawrence Groner, Judge of the District Court of the United States for the Eastern District of Virginia:

Your petitioner, Fred N. Crouch, legal guardian of Kathleen Konstovich, respectively shows:

1. That the United States of America is a corporation created by the Constitution of the United States, with its principal office in the City of Washington and the District of Columbia.

2. Your petitioner and Kathleen Konstovich reside in the City of Norfolk, State of Virginia, and within the Eastern District of Virginia.

3. On the 4th day of December, 1916, Kathleen Konstovich was married to Stephen Konstovich in the City of Norfolk, State of Virginia, as will more fully appear from a certified copy of the marriage certificate attached hereto and prayed to be taken and read as a part of this petition.

4. Some time prior to February 1st, 1918, the said Stephen Konstovich, the husband of Kathleen Konstovich, enlisted in the Naval Forces of the United States of America.

5. On the 1st day of February, 1918, the United States of America issued to Stephen Konstovich, pursuant to the War Risk Insurance Act, a policy of insurance in the amount of Ten Thousand Dollars (\$10,000.00) payable in monthly installments of Fifty-seven Dollars and Fifty-Seven Cents (\$57.57) in which policy of insurance the said Kathleen Konstovich was named beneficiary, all of which will more fully appear from certain exhibits filed herewith, marked A and B and prayed to be taken and read as a part of this petition.

6. That the said Stephen Konstovich, while serving (3) in the Naval Forces of the United States of America as aforesaid, was on June 14th, 1918, a member of the crew of the United States Ship "Cyclops", which said ship was officially designated by the United States Government as lost on March 31st, 1918, and the said Stephen Konstovich was officially reported as dead on March 31st, 1918, as will more fully appear from exhibits C and D, filed herewith and prayed to be taken and read as a part of this petition.

7. That on the 4th day of September, 1918, an award of insurance was made to Fred N. Crouch, as the legal guardian of Kathleen Konstovich, payable in installments of Fifty-Seven Dollars and Fifty Cents (\$57.50) from the 1st day of April, 1918, until the sum of Ten Thousand Dollars (\$10,000.00) was paid in full, as will more fully appear from exhibit B, attached hereto.

8. That on the 11th day of October, 1918, Fred N. Crouch as the legal guardian of Kathleen Konstovich was awarded the sum of Twenty-Five Dollars (\$25.00) a month from the 1st day of April, 1918, payable to the said Kathleen Konstovich, by reason of the death of her husband, the said Stephen Konstovich, in accordance with the War Risk Insurance Act, all of which will more fully appear from a letter of the Bureau of War Risk Insurance to Fred N. Crouch, as the legal guardian of Kathleen Konstovich, which is attached hereto marked exhibit E, and prayed to be taken and read as a part of this petition.

9. That said insurance and said compensation were paid to your petitioner until the 12th day of July, 1921, when the Bureau of War Risk Insurance notified your petitioner that the said Kathleen Konstovich had terminated her right to receive benefits of compensation and contract by her misconduct, and said compensation and contract insurance have not been paid to your petitioner since the 12th day of July, 1921, all of which will more fully appear from a letter of the Bureau of War Risk Insurance to Fred N. Crouch, July 12th, 1921, attached (4) to this petition, marked exhibit F and prayed to be read and taken as a part of this petition.

10. Your petitioner notified the Bureau of War Risk Insurance that the said Kathleen Konstovich had not been guilty of any acts of misconduct that would terminate her right to receive compensation and contract insurance, but the said Bureau of War Risk Insurance has refused and still refuses to pay to your petitioner the compensation and contract insurance which they are entitled to and your petitioner now avers that the said Kathleen Konstovich has never by any misconduct or otherwise terminated her right to receive benefits of compensation and contract insurance.

11. Your petitioner avers that a disagreement has arisen between him, as the legal guardian of Kathleen Konstovich, and the Bureau of War Risk Insurance and that in accordance with the War Risk Insurance Act, your petitioner has presented this petition to this honorable Court.

4 F. N. CROUCH, LEGAL GUARDIAN, PLFF. IN ERROR,

Wherefore, your petitioner prays for a judgment or decree against the United States of America upon the facts and law, that the said United States of America be directed to pay to your petitioner all accrued installments of compensation and contract insurance and that the said United States of America be directed to pay to your petitioner said compensation and contract insurance in accordance with its agreement and in accordance with the War Risk Insurance Act, and for such other and further relief in the premises as may be just.

FRED N. CROUCH,  
Legal guardian of  
Kathleen Kenstovich.  
Petitioner.

(5)

STATE OF VIRGINIA,  
City of Norfolk,  
Eastern District of Virginia, ss:

Fred N. Crouch, being duly sworn, deposes and says, I am the above named Petitioner, the foregoing petition is true to my own knowledge except as to matters therein stated to be upon information and belief and as to those matters, I believe it to be true.

FRED N. CROUCH.

Sworn to before me, this 14th day of December, 1921.  
My commission expires November 27th, 1923.

ERNEST S. MERRILL,  
Notary Public.

City of Norfolk, Virginia.

**ANSWER TO PETITION**

(6) Filed March 24th, 1922.

Now come the defendants, the United States of America, and reserving all just exceptions to the petition of the complainant, answers the petition in so far as defendants are advised.

1. For answer to the first paragraph of the petition the defendants say that the Government of the United States is a sovereign power created by the Constitution of the United States and is not a corporation as alleged.

2. The defendants have at this time no information upon which to either admit or deny the allegations of the second paragraph of the petition.

3. The defendants admit the allegations contained in the third paragraph of the petition.

4. The defendants admit the allegations contained in the fourth paragraph of the petition.

5. The defendants admit the allegations contained in the fifth paragraph of the petition.

6. The defendants admit the allegations contained in the sixth paragraph of the petition.

7. The defendants admit the allegations set out in paragraph seven of the petition in so far as they correspond to and agree with the award as of the fourth day of September, 1918.

8. The defendants admit the allegations contained in (7) paragraph eight of the petition in so far as they agree with and correspond to the award dated the 11th day of October, 1918, by the Bureau of War Risk Insurance.

9. The defendants admit the allegations contained in paragraph nine of the petition.

10. Referring to paragraph ten of the petition, the defendants deny that the petitioner ever notified the Bureau of War Risk Insurance that his ward, Kathleen Konstovich, had not been guilty of any acts of misconduct that would terminate her right to receive compensation under the contract of insurance, and further say that the petitioner has admitted the open and notorious illicit cohabitation of his said ward, Kathleen Konstovich, a widow, and was himself guilty of having illicit open and notorious cohabitation with his ward. The



defendants deny that the petitioner is entitled to any compensation and admit that the Bureau of War Risk Insurance has refused and still refuses to pay petitioner any further compensation. Further, the defendants aver that the said Kathleen Konstovich, widow of Stephen Konstovich, has been guilty of such open and notorious illicit cohabitation as to terminate her right to compensation on insurance, which also terminates the right of the petitioner as legal guardian of the said Kathleen Konstovich, to collect any compensation on account of the said contract of insurance.

11. Answering paragraph eleven of the petition, the defendants deny that any disagreement has arisen between the petitioner as legal guardian of Kathleen Konstovich, and the Bureau of War Risk Insurance, and aver that the Bureau of War Risk Insurance are the sole judges to determine upon their investigation whether or not the said Kathleen Konstovich had been guilty of such open and notorious illicit cohabitation as to terminate her right to compensation under the said contract of insurance, and that the decision of the Bureau of War Risk Insurance is final and cannot be reviewed by this (8) Honorable Court. The defendants specifically deny that the petitioner has any right to present his petition to this court and ask that the same be dismissed and that the defendants recover their costs in this behalf expended.

12. Defendants hereto attach the following papers:

(a) Photostatic copy of affidavit of Mrs. Kathleen M. Konstovich under date of the 4th day of June, 1921 at Norfolk, Virginia. and subscribed and sworn to before H. Oden Lake, Field Examiner, Bureau of War Risk Insurance;

(b) Photostatic copy of affidavit of Samuel S. Spragg under date of 3rd day of June, 1921, at Norfolk, Virginia, subscribed and sworn to before H. Oden Lake, Field Examiner, Bureau of War Risk Insurance;

(c) Photostatic copy of affidavit of J. C. Hozier under date of 3rd day of June, 1921, subscribed and sworn to before H. Oden Lake, Field Examiner, Bureau of War

Risk Insurance, upon which there is also certificate by Samuel S. Spragg that the person referred to in the affidavit of J. C. Hozier was none other than Kathleen Konstovich, which certificate was subscribed and sworn to before H. Oden Lake, Field Examiner, Bureau of War Risk Insurance, at Norfolk, Virginia, on the 3rd day of June, 1921;

all of which have been duly certified by the Director of the United States Veterans' Bureau, pursuant to the Section 882 of the Revised Statutes, that they are true copies of the originals on file in the United States Veterans' Bureau, Washington, D. C.

(d) Photostatic copy of letter of Grace L. Wellmore, Field Agent, Bureau of Protective Social Measures, dated December 17, 1920, to which is attached photostatic copy of statement made by Frederick N. Crouch to Miss Grace L. Wellmore at the time she was investigating the conduct of Kathleen Konstovich and in her line of duty.

It is desired that these exhibits be read as a part of (9) this answer.

PAUL W. KEAR,  
United States Attorney.  
By L. S. PARSONS,  
Assistant United States Attorney.

Norfolk, Virginia,  
March 24, 1922.

### **ORDER FILING AMENDED ANSWER**

(10) Ent. & Filed April 3rd, 1922.

This day came the parties by their attorneys, and the defendant moved the Court for leave to file its amended answer, which leave is granted, and the said amended answer is accordingly filed. Thereupon this cause came on to be heard upon the pleadings and proof, and hav-

ing partly heard the evidence the further consideration of same was continued until tomorrow morning.

EDMUND WADDILL, JR.,  
U. S. Circuit Judge

**AMENDED ANSWER**

(11) Filed April 3rd, 1922.

Now comes the defendants, the United States of America, and ask leave of the Court to file an amendment to the answer heretofore filed in this cause, the amendments bearing upon Sections 6, 7, 8, 10, and 11 of the petition.

6. The defendants now say that since the answer heretofore made was filed, they are now advised that the officially designated date of the death of Stephen Konstovich is March 31, 1918, instead of June 14, 1918, as will more fully appear by letter from the Bureau of War Risk Insurance under date of December 19, 1919, addressed to Fred N. Crouch, legal guardian of Kathleen Konstovich, and by a further letter of the Bureau of War Risk Insurance under date of July 6, 1920, addressed to Fred N. Crouch, legal guardian of Kathleen Konstovich, showing that the insurance award had been amended to allow payments beginning as of April 1st, 1918, and the United States of America did in pursuance of such amended award, pay the amounts due from April 1st, 1918, and up to the time that the award was terminated by her open and notorious illicit cohabitation, and as will also appear by decision of the Comptroller of the Treasury of the United States of America under date of the 30th day of October, 1919.

7. The defendants say that since the answer heretofore made and filed, that they have been advised that the date from which award of insurance was made and paid to Fred N. Crouch as legal guardian of Kathleen Konstovich is April 1, 1918, instead of the 15th day of June, 1918, and that the award was amended in that respect (12) and that payments were actually made upon the

basis up to the time of the termination of the right by the open and notorious illicit cohabitation of the ward, Kathleen Konstovich.

8. The defendants now say that since the filing of the answer heretofore made, they have been advised that the insurance award to Fred N. Crouch, as legal guardian of Kathleen Konstovich, was paid from April 1st, 1918, until the date of termination instead of from the 15th day of June, 1918, as alleged in the petition.

10. Referring to paragraph ten of the petition, the defendants deny that the petitioner ever notified the Bureau of War Risk Insurance that his ward, Kathleen Konstovich, had not been guilty of any acts of misconduct that would terminate her right to receive compensation and insurance, and further *day* that the petitioner has admitted the open and notorious illicit cohabitation of his ward, Kathleen Konstovich, a widow, and was himself guilty of having illicit open and notorious cohabitation with his ward. The defendants deny that the petitioner is entitled to any compensation or insurance and admit that the Bureau of War Risk Insurance has refused and still refuses to pay petitioner any further compensation or insurance. Further, the defendants aver that the said Kathleen Konstovich, widow of Stephen Konstovich, has been guilty of such open and notorious illicit cohabitation as to terminate her right to compensation and/or insurance, which also terminates the right of the petitioner as legal guardian of the said Kathleen Konstovich, to collect any such compensation or insurance.

11. Answering paragraph eleven of the petition, the defendants deny that any disagreement has arisen between the petitioner as legal guardian of Kathleen Konstovich, and the Bureau of War Risk Insurance and aver that the Bureau of War Risk Insurance, are the sole judges to determine upon their investigation whether or not the said Kathleen Konstovich had been guilty of such (13) open and notorious illicit cohabitation as to terminate her right to compensation under the said contract of insurance, and that the decision of the Bureau of War Risk Insurance is final and cannot be reviewed by this Honorable Court, unless such discretion is abused. The

10 F. N. CROUCH, LEGAL GUARDIAN, PLFF. IN ERROR,

defendants specifically deny that the petitioner has any right to present his petition to this Court and more particularly as to compensation and ask that the same be dismissed and that the defendants recover their costs in this behalf expended.

PAUL W. KEAR,  
United States Attorney.  
By L. S. PARSONS,  
Assistant United States Attorney.

Norfolk, Virginia.  
April 3rd, 1922.

### ORDER CONTINUING CAUSE

(14) . Entered April 4th, 1922.

This day came the parties by their attorneys and issue having been joined, the testimony of the witnesses was heard by the court and the court desiring to have the matter continued to a further day, the cause was continued until April 7, 1922.

EDMUND WADDILL, JR.,  
U. S. Circuit Judge.

Norfolk, Virginia,  
April 4, 1922.

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

#### FINDINGS OF FACT.

(15) . Filed April 7, 1922.

Having carefully considered the pleading, the evidence introduced and arguments of counsel, in this case, the court finds:

1. Stephen Konstovich entered the naval service

April 7, 1917. On February 1, 1918, he made application for \$10,000 insurance which he made payable to Kathleen Konstovich whom he described as wife. Insured was lost aboard the U. S. S. "Cyclops" with all on board during the month of March, 1918, and the official date of his death has been designated as March 31, 1918, by an opinion of the Comptroller of the Treasury dated October 30, 1919. On September 4, 1918, an award of insurance was duly made to Fred N. Crouch as the legal guardian of Kathleen Konstovich, payable in installments of \$57.50 per month to the said Kathleen Konstovich. The said Kathleen Konstovich has not re-married.

2. Stephen Konstovich died in the naval service of the United States March 31, 1918, with \$10,000 insurance in force, payable to his widow, Kathleen Konstovich. Installments of insurance accruing after the death of insured were paid until July 12, 1921, when the Veterans' Bureau notified the plaintiff that she had terminated her rights to receive insurance as of September 17, 1920, by her open and notorious illicit cohabitation.

3. The plaintiff, Kathleen Konstovich, on different occasions during the year 1920 was registered at the York Hotel, Ocean View, Virginia, as the wife of one Samuel Spragg, a man to whom she was not married, and did on such occasions spend the night or nights at the York Hotel and have sexual intercourse with the said Samuel S. Spragg.

4. The plaintiff, Kathleen Konstovich, did on numerous occasions between August 10th, 1920, and December 3rd, 1920, at her own home and in an automobile have sexual intercourse with Samuel S. Spragg.

5. The plaintiff, Kathleen Konstovich, at the time of the termination of her insurance and during the year 1920 at the time of her illicit intercourse with Samuel S. (16) Spragg, bore a bad reputation for chastity and morality, and was suspected of immoral conduct by sundry persons.

CONCLUSIONS OF LAW.

1. Under the foregoing facts the court finds as a conclusion of law that the said Kathleen Konstovich has violated the provisions of the War Risk Insurance Act by her open and notorious illicit cohabitation, and terminated her right to war risk insurance as of September 17, 1920.

2. The court further finds as a conclusion of law that as the United States has never consented to be sued for compensation under the War Risk Insurance Act, the plaintiff's suit for compensation must be dismissed.

Judgment will be entered for the defendant.

EDMUND WADDILL, JR.,  
United States Circuit Judge.

Norfolk, Virginia.  
April 7, 1922.

ORDER OF JUDGMENT

(17) Entered April 7th, 1922.

This day came the parties by their attorneys and the Court having fully considered the questions arising upon the pleadings and proofs and arguments of counsel thereon, is of opinion and doth decide, for reasons stated in writing, setting forth its specific findings of fact and conclusions of law, that the plaintiff is not entitled to recover, doth so adjudge and decide, and

It Is Ordered, that the petition filed by the plaintiff be dismissed at his cost.

EDMUND WADDILL, JR.,  
U. S. Circuit Judge.

Norfolk, Va.,  
April 7th, 1922.



**ASSIGNMENT OF ERRORS**

(18) Filed July 1st, 1922.

On this 1st day of July, 1922, the plaintiff, Fred N. Crouch, Legal Guardian of Kathleen Konstovich, widow, comes and says that the judgment entered against him on the 7th day of April, 1922, in this court is erroneous and the plaintiff makes the following assignments of error in the ruling of the court in its conclusion of law from the facts certified by the court and in the judgment of the court, to-wit:

1. The court erred in finding from the facts certified that the plaintiff was not entitled to war risk insurance.

2. The court erred in finding from the facts certified that the plaintiff was not entitled to compensation under the war risk insurance act.

3. The court erred in its conclusion of law from the facts certified in holding as a conclusion of law that from the facts certified the said Kathleen Konstovich has violated the provisions of the War Risk Insurance Act by her open and notorious illicit cohabitation, and terminated her right to war risk insurance as of September 17, 1920.

Wherefore, plaintiff prays that the judgment entered herein against him may be reversed.

FRED N. CROUCH,  
Legal Guardian of Kathleen  
Konstovich, Widow.  
By E. S. MERRILL and  
JAS. G. MARTIN & BRO.,  
Counsel.

(19)

**STIPULATION AS TO WHAT THE RECORD SHALL  
CONSIST**

Filed July 31st, 1922.

It is stipulated that the Clerk of this Court make up a



14 F. N. CROUCH, LEGAL GUARDIAN, PLFF. IN ERROR,

transcript of the record in the above case, and that the record shall consist of all the papers in the case, to-wit:

1. Petition.
2. Answers.
3. All Exhibits.
4. All orders of the Court.
5. The findings and decision of the Court.
6. The Assignments of Error.

ERNEST S. MERRILL,  
JAS. G. MARTIN,  
Attorneys for Plaintiff.

.....  
Attorney for Defendant.

(20)

**MEMORANDUM OF ORIGINAL PAPERS ACCOMPANYING TRANSCRIPT OF RECORD**

- (1) Petition for Writ of Error, filed July 1st, 1922.
- (2) Order granting Writ of Error, Ent. July 1st, 1922.
- (3) Writ of Error filed July 1st, 1922.
- (4) Appeal Bond filed July 3rd, 1922. Obligors, Fred N. Crouch, Principal, and U. S. Fidelity & Guaranty Company, Surety. Penalty \$100.00. Conditioned for damages and costs.
- (5) Citation dated July 1st, 1922. Service accepted.
- (6) Order extending time to file transcript of record, Ent. and filed Aug. 5, 1922.

(21)

**CERTIFICATE OF THE CLERK**

UNITED STATES OF AMERICA,  
Eastern District of Virginia—ss.:

I, Joseph P. Brady, Clerk of the United States District Court for the Eastern District of Virginia, do hereby certify that the foregoing is a full and true transcript of the record of proceedings and judgment of the said Court as stipulated by proctors for the Plaintiff in Error, in the therein entitled cause.

In testimony whereof, I hereunto set my hand and affix the seal of the said Court, at Norfolk, in said District, this 22 day of August, 1922.

JOSEPH P. BRADY, Clerk.

By Wm. B. WALKER,

Deputy Clerk.

(Seal)

[fol. 17]

## PROCEEDINGS IN THE

**UNITED STATES CIRCUIT COURT OF APPEALS FOR THE  
FOURTH CIRCUIT**

No. 2041

[Title omitted]

Error to the District Court of the United States for the Eastern District of Virginia, at Norfolk

August 23, 1922, the transcript of record is filed and the cause docketed.

Same day, the original petition for writ of error, order allowing writ of error, writ of error, writ of error bond, and citation are certified up under Sec. 7 of Rule 14.

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**ORDER EXTENDING TIME TO FILE RECORD—Filed August 3, 1922**

For good and sufficient reasons appearing to the Court, It is hereby ordered that the time for filing the Transcript of Record with the Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, be extended from the 5th day of August, 1922, for a period [fol. 18] of Twenty (20) days, in the above entitled cause.

Edmund Waddill, Jr., United States Circuit Judge. Richmond, Va., August 5", 1922.

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IN U. S. C. C. A.

**NOTATION AS TO EXHIBITS**

Same day, to-wit, August 23, 1922, the original exhibits (Marriage License, etc.; Exhibit marked "Exhibit A" Certificate as to Insurance taken out by Stephen Konstovich; Exhibits marked Exhibit- "B," "C," "D," "E" and "F," Certificate signed by Director of U. S. Veterans' Bureau as to Photostatic copies of Affidavit of Mrs. Kathleen M. Konstovich, et als.; Photostat copy of affidavit of Mrs. Kathleen Konstovich; Photostat copy of affidavit of Mr. Samuel S. Spragg; Photostatic copy of Hotel Register; Photostatic copy of Letter to Mr. Clifton Hicks from Grace L. Wellman, Field Agent of State Department of Health; and Photostatic copy of statement made by Fred N. Crouch) are certified up.

# APPEARANCES

Same day, the appearance of Ernest S. Merrill and Jas. G. Martin entered for the plaintiff in error.

August 28, 1922, special appearance, only to make preliminary motions, of Paul W. Kear, U. S. Attorney, and L. S. Parsons, Assistant U. S. Attorney, is entered for the defendant in error.

September 28, 1922, twenty-five copies of the printed record are led.

## IN U. S. CIRCUIT COURT OF APPEALS

CONSENT ORDER TRANSFERRING CASE TO SUPREME COURT UNDER THE ACT OF CONGRESS APPROVED SEPTEMBER 14, 1922—Filed and Entered December 15, 1922

[fol. 19]

[Title omitted]

This cause having been brought to this court, when it should have been taken to the Supreme Court of the United States, now pursuant to the Judicial Code, Section 238 (a), as added by the Act of Congress of September 14, 1922, this cause is transferred to the Supreme Court of the United States, and all the papers in the case shall be sent by the Clerk of this court to the Clerk of the Supreme Court of the United States.

Martin A. Knapp, U. S. Circuit Judge. C. A. Woods, Circuit Judge. Dec. 15, 1922.

Endorsed: We consent to this: Ernest S. Merrill, Jas. G. Martin. Seen. L. S. Parsons, Asst. U. S. Atty.

[fol. 20]

## CLERK'S CERTIFICATE

UNITED STATES OF AMERICA,  
Fourth Circuit, ss:

I, Claude M. Dean, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true transcript of the record and proceedings in the therein entitled cause as the same remains upon the records and files of the said Circuit Court of Appeals, and is herewith transferred to the Supreme Court of the United States in accordance with the Act of Congress of September 14, 1922.

In testimony whereof, I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, Virginia, this 8th day of January, A. D., 1923.

Claude M. Dean, Clerk U. S. Circuit Court of Appeals, Fourth Circuit. [Seal of United States Circuit Court of Appeals, Fourth Circuit.]

[fol. 21] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE  
EASTERN DISTRICT OF VIRGINIA

[Title omitted]

*PETITION FOR WRIT OF ERROR*—Filed July 1, 1922

And now comes the above named plaintiff in the above entitled case and says that on the 7th day of April, 1922, this court entered judgment against him in this cause for said defendant, in which judgment and proceedings in this case certain errors were committed to the prejudice of said plaintiff, all of which will more fully appear in detail from the assignments of errors duly filed with the clerk of this court.

Wherefore, said plaintiff prays that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the Fourth Circuit for the correction of the errors so complained of, and that a transcript of the record, papers and proceedings in this case, duly authenticated, may be sent to the said Circuit Court of Appeals.

Fred N. Crouch, Legal Guardian of Kathleen Konstovich,  
Widow, By E. S. Merrill and Jas. G. Martin & Bro., His  
Counsel.

[fol. 22] [File endorsement omitted.]

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[fol. 23] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE  
EASTERN DISTRICT OF VIRGINIA

[Title omitted]

*ORDER ALLOWING WRIT OF ERROR*—Filed July 1, 1922

On petition of the plaintiff in error in this case it is now ordered that a writ of error issue as prayed, provided said plaintiff, or some one for him, execute an appeal bond within ten days from this date, conditioned according to law, with security to be approved by the Judge of this court in the penalty of One Hundred Dollars (\$100.00).

Edmund Waddill, Jr., United States Circuit Judge. Rich-  
mond, Va., July 1, 1922.

[fol. 24] [File endorsement omitted.]

[fol. 25] BOND ON WRIT OF ERROR [for \$100; approved; omitted in printing]

[fol. 26] [File endorsement omitted.]

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[fol. 27] WRIT OF ERROR—Filed July 1, 1922

UNITED STATES OF AMERICA,  
Eastern District of Virginia, ss:

The President of the United States to the honorable the judge of the District Court of the United States for the Eastern District of Virginia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Fred N. Crouch, legal guardian of Kathleen Konstovich, widow, and The United States of America a manifest error hath happened, to the great damage of the said Fred N. Crouch, legal guardian of Kathleen Konstovich, widow as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Fourth Circuit, together with this writ, so that you have the same in the said Circuit Court of Appeals at Richmond, within forty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edmund Waddill, Jr., U. S. Circuit Judge presiding in the District Court of the United States for the Eastern District of Virginia, this 1st day of July, in the year of our Lord one thousand nine hundred and twenty-two.

Joseph P. Brady, Clerk of the District Court of the United States for the Eastern District of Virginia, By Wm. B. Walker, Deputy Clerk.

Allowed by: Edmund Waddill, Jr., United States Circuit Judge.

[fol. 28] [File endorsement omitted.]

[fol. 29]

## CITATION AND SERVICE

UNITED STATES OF AMERICA,  
Eastern District of Virginia, ss:

The President of the United States of America to The United States of America, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Fourth Circuit, to be holden at Richmond within forty days from this date, pursuant to a writ of error filed in the Clerk's Office of the District Court of the United States for the Eastern District of Virginia, wherein Fred N. Crouch, Legal Guardian of Kathleen Konstovich, widow, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the Judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edmund Waddill, Jr., U. S. Circuit Judge, presiding in the District Court of the United States for the Eastern District of Virginia, this 1st day of July, in the year of our Lord one thousand nine hundred and twenty-two.

Edmund Waddill, Jr., U. S. Circuit Judge.

Due service of the foregoing citation is accepted this 29th day of July, 1922.

Paul W. Kear, U. S. Atty. L. S. Parsons, Asst. U. S. Atty.

[fol. 30] [File endorsement omitted.]

Endorsed on cover: File No. 29,605. U. S. Circuit Court of Appeals, Fourth Circuit. Term No. 323. Fred N. Crouch, legal guardian of Kathleen Konstovich, widow, plaintiff in error, vs. The United States of America. In error to the District Court of the United States for the Eastern District of Virginia, transferred from the United States Circuit Court of Appeals for the Fourth Circuit under the Act of Congress approved September 14, 1922. Filed May 4th, 1923. File No. 29,605.

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1923

No. 323.

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FRED N. CROUCH,  
Guardian of Kathleen Konstovich

v.

THE UNITED STATES.

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BRIEF ON BEHALF OF FRED N. CROUCH,  
Guardian of Kathleen Konstovich.

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This is a case coming up from the District Court of the United States for the Eastern District of Virginia, involving War Risk Insurance, in behalf of Kathleen Konstovich, whose husband was lost on the vessel "Cyclops", with a \$10,000.00 insurance policy upon his life, and which money was accordingly payable to her, in installments as provided by statute.

The procedure in this case being governed substantially by the statute commonly called the Tucker Act the matters of *fact* determined by the trial court are binding and only matters of law are now involved.



The facts found by the trial court, and the conclusion of law therefrom were expressly stated in the finding as follows: (R. 10, 11, 12.)

**"FINDINGS OF FACT AND CONCLUSIONS  
OF LAW.**

**FINDINGS OF FACT.**

"Having carefully considered the pleading, the evidence introduced and arguments of counsel, in this case, the court finds:

"1. Stephen Konstovich entered the naval service April 7, 1917. On February 1, 1918, he made application for \$10,000 insurance which he made payable to Kathleen Konstovich whom he described as wife. Insured was lost aboard the U. S. S. 'Cyclops' with all on board during the month of March, 1918, and the official date of his death has been designated as March 31, 1918, by an opinion of the Comptroller of the Treasury dated October 30, 1919. On September 4, 1918, an award of insurance was duly made to Fred N. Crouch as the legal guardian of Kathleen Konstovich, payable in installments of \$57.50 per month to the said Kathleen Konstovich. The said Kathleen Konstovich has not remarried.

"2. Stephen Konstovich died in the naval service of the United States March 31, 1918, with \$10,000 insurance in force, payable to his widow, Kathleen Konstovich. Installments of insurance accruing after the death of insured were paid until July 12, 1921, when the Veterans' Bureau notified the plaintiff that she had terminated her rights to receive insurance as of September 17, 1920, by her open and notorious illicit cohabitation.

"3. The plaintiff, Kathleen Konstovich, on numerous occasions during the year 1920 was registered at the York Hotel, Ocean View, Virginia, as the wife of one Samuel Spragg, a man to whom she was not married, and did on such occasions spend the night or nights at the York Hotel and have sexual intercourse with the said Samuel S. Spragg.

"4. The plaintiff, Kathleen Konstovich, did on numerous occasions between August 10, 1920, and December 3rd, 1920, at her own home and in an automobile have sexual intercourse with Samuel S. Spragg.

"5. The plaintiff, Kathleen Konstovich, at the time of the termination of her insurance and during the year 1920, at the time of her illicit intercourse with Samuel S. Spragg, bore a bad reputation for chastity and morality, and was suspected of immoral conduct by sundry persons.

#### "CONCLUSION OF LAW.

"1. Under the foregoing facts the court finds as a conclusion of law that the said Kathleen Konstovich has violated the provisions of the War Risk Insurance Act by her open and notorious illicit cohabitation, and terminated her right to war risk insurance as of September 17, 1920.

"2. The court further finds as a conclusion of law that as the United States has never consented to be sued for compensation under the War Risk Insurance Act, the plaintiff's suit for compensation must be dismissed.

"Judgment will be entered for the defendant."

### THE ERROR RELIED UPON IS:

That the District Court erred in its first conclusion of law above stated based upon its findings of fact, and that this conclusion of law does not follow from said findings of fact.

### ARGUMENT.

It will be seen from the findings of fact that at the time of the death of Stephen Konstovich, the husband of Kathleen Konstovich, there was in force a policy of war risk insurance in the sum of Ten Thousand Dollars (\$10,000.00) payable to his widow, Kathleen Konstovich. This insurance was paid in instalments of Fifty-seven Dollars and Fifty Cents (\$57.50) per month until the 12th day of July, 1921, when the Veterans Bureau notified the plaintiff that she had terminated her right to receive the insurance as of September 17, 1920, by her open and notorious illicit cohabitation.

The following provision is found in Section 514 (Act Sept. 2, 1914, c. 193, Par. 2, and as amended, Act June 25, 1918, c. 104, Par. 1.) Evidence of marriage of claimants: definitions:

“\* \* \* And the open and notorious illicit cohabitation of a widow who is a claimant shall operate to terminate her right to compensation or insurance from the commencement of such cohabitation. \* \* \*

The sole question presented, therefore, is whether or not the facts as found by the District Court justify the conclusion of law that Kathleen Konstovich had

violated the provisions of the War Risk Insurance Act by her open and notorious illicit cohabitation. The plaintiff contends most earnestly that occasional or frequent acts of adultery do not constitute open and notorious illicit cohabitation as this term has been defined by practically every court of last resort in the United States of America, including the Supreme Court of the United States.

In the recent case of *Burns et al. v. State* (Okla.) 182 Pac. 738, the defendants had been convicted of living together in open and notorious adultery. The court said:

"Before proceeding to a consideration of the evidence of the state's witnesses upon which reliance is based to support this conviction, it is appropriate to call attention to certain definitions of the crime 'open and notorious adultery' heretofore given by this court. In *Copeland v. State*, 10 Okla. Cr. 1, 133 Pac. 158, it is held:

'To constitute living together in open and notorious adultery the parties must reside together publicly, in the face of society, as if the conjugal relation existed between them, and their illicit intercourse must be habitual.'

In *Kitchens v. State*, 10 Okla. Cr. 603, 140 Pac. 619, while it is held that it is not necessary that the parties claim to be husband and wife if they live together in the same house in the familiar manner of husband and wife, yet in order to constitute the offense of living together in open and notorious adultery, it is necessary that their lewd and lascivious cohabitation and conduct

be open and notorious. In the latter case a reading of the statement of facts discloses that the parties convicted lived together in the same house by themselves, and that their conduct was lewd and lascivious, and that several witnesses saw the parties in compromising positions and taking indecent liberties with the persons of each other.

In the case of *Spencer v. State*, 14 Okla. Cr. 178, 169 Pac. 270, L. R. A. 1918F, 592, where the evidence was held sufficient to support a conviction of living together in open and notorious adultery, the facts show that the convicted parties, although unmarried, lived together in the same house as husband and wife, and that such relationship continued for a prolonged length of time even after it became generally known in the community that the parties were not married to each other.

In the recent case of *Barber et al. v. State*, 15 Okla. Cr.———, 179, Pac. 790, wherein it was held that the evidence was insufficient to sustain a conviction of living together in open and notorious adultery, the facts are not dissimilar to those in this case. In that case it was also held:

'To constitute living in 'open and notorious adultery', under the statute, there must be something more than occasional illicit intercourse indulged in; the parties must reside together publicly in the face of society, as if conjugal relations existed between them, and their so living must become generally known in the community in which they live.'

The court further stated in its opinion (P. 745):

"Had the state relied upon a specific act of adultery, and had there been a conviction of

adultery alone, and not of 'living in open and notorious adultery', the conviction could have been sustained, but that is not the case.

The prosecution, from its inception to the rendition of the judgment, was for 'living in open and notorious adultery'. This court is bound by the record before us, and, applying the law to the facts of this case, the conclusion is reached that the evidence wholly fails to support a conviction of 'living together in open and notorious adultery' within the meaning of our statute, as construed in the cases above cited."

In the case of *State v. Ramage et al.* (W. Va.) 84 S. E. 246, in which the defendants were convicted in the lower court of lewd and lascivious cohabiting together, the Supreme Court of Appeals of West Virginia, in reversing the conviction, said: (P. 247):

"Assuming the facts to be true, the question of law arises: Are they sufficient to sustain the indictment? This court held lewd and lascivious association and cohabitation to mean 'the living and cohabiting together of a man and a woman, not married to each other, in the same house, as husband and wife.' *State v. White*, 66 W. Va. 45, 66 S. E. 20. That case followed *State v. Miller*, 42 W. Va. 215, 24 S. E. 882, wherein the same doctrine was announced, and in which it was also held that occasional acts of illicit intercourse did not prove a violation of the statute, although the man and woman occupied the same house. The illicit relation must be habitual and continuous. It was early held by the Supreme Court of Massachusetts, in construing a statute worded similar to our own, that proof of one criminal intercourse did not con-

stitute a violation of the statute. Says the court in its opinion:

'The design of the statute, in this particular provision, was to prevent evil and indecent examples, tending to corrupt the public morals.' *Commonwealth v. Calef*, 10 Mass. 153.

Mr. Bishop, in his work on Statutory Crimes, asserts the same doctrine, and cites that case and others to support it. Section 712.

Underhill says:

'It must appear that the parties lived together openly and notoriously as though husband and wife.' Underhill, *Criminal Evidence*, Par. 384.

One or two instances of incontinence are not enough.

'It is the more indecent, open, and demoralizing example of living in adultery or fornication as man and wife that the statute was designed to prevent.' *Pruner & Clarke v. Commonwealth*, 82 Va. at page 118, opinion of Judge Lewis:

Iowa has the same kind of a statute that exists in Virginia and West Virginia, and under an indictment there charging 'that the defendants, not being married to each other, did lewdly and lasciviously associate and cohabit together,' it was proven that they lived together in the same house as man and hired girl; that they had so lived for several months; that there were but two beds in the house; that a witness for the state and his brother slept in one and the woman slept in the other, and the other defendant slept on the floor;

that on two occasions defendants were seen together in the same bed. The court held that the evidence was not sufficient, and, in its opinion, says:

'Secret acts of intercourse would not make them liable. The burden of the offense is the open, lewd, lascivious conduct of the parties living together as husband and wife. It is the publicity and disgrace, the demoralizing and debasing influence, that the law is designed to prevent.' State v. Marvin, 12 Iowa, 506.

That case, as well as Commonwealth v. Calef, *supra*, was cited approvingly by the Supreme Court of Florida, in Luster et al. v. State, 23 Fla. 339, 2 South. 690, wherein the court of that state in construing a statute describing the offense in the same language as our own, held that the dwelling together by the parties must be 'as if the conjugal relation existed. A single or mere occasional acts of incontinency are insufficient to sustain the charge.' To the same effect are Pen-ton v. State, 42 Fla. 560, 28 South. 774; Taylor v. State, 36 Ark. 84; and Carotti v. State, 42 Miss. 334, 97 Am. Dec. 465. In a later case the Supreme Court of Mississippi held that it was not necessary that the parties hold themselves out to the community as husband and wife, 'but only that they should openly and notoriously consort and live together as if they were husband and wife—that is to say, as husbands and wives usually live'—that so long as the illicit intercourse is secret, or attempted to be made so, the statute is not violated, 'but that, whenever secrecy is abandoned and the concubinage is open, the offense is complete.' Kinard v. State, 57 Miss. on page 134 of the opinion. The statute of that state, however, was later amended so as to make it



unnecessary to constitute the offense for the parties to dwell together publicly as husband and wife, and permitting the crime to be proven 'by circumstances which show habitual sexual intercourse'. *Granberry v. State*, 61 Miss. 440. The Supreme Court of Missouri also holds that clandestine acts of illicit intercourse, however frequent, do not constitute a violation of the statute which forbids a man and a woman, not married to each other, from 'lewdly and lasciviously abiding and cohabiting with each other.' The court citing many of the cases above cited, likewise holds that the statute was aimed to prevent acts 'which necessarily tend by their openness and notoriety, or by their publicity to debase and lower the standard of public morals.' *State v. Chandler*, 132 Mo. 155, 33 S. W. 797, 53 Am. St. Rep. 483. A similar view of the California statute, on the same subject, is taken by the Supreme Court of that state. *People v. Salmon*, 148 Cal. 303, 82 Pac. 42, 2 L. R. A. (N. S.) 1186, 113 Am. St. Rep. 268. We note, however, that the language of the California statute differs from the language of the statutes of the other states whose decisions we have above cited; but, notwithstanding, that court has followed the decisions of the Iowa and Missouri courts, and cites approvingly their decisions."

The following authorities will be found to the same effect:

*In re Snow*, 120 U. S. Rep. 274,  
*Hans Nielsen, Petitioner*, 131 U. S. Rep. 176.  
*Gaylor vs. McHenry and others*, 15 Ind. 383.  
 11 C. J. 950.

Said guardian prays that the decision of said District Court may be reviewed and reversed, and that such other relief may be granted as may be adapted to the nature of the case.

Respectfully submitted,

JAS. G. MARTIN,  
 ERNEST S. MERRILL,  
 Counsel for Fred N. Crouch,  
 Guardian of Kathleen  
 Konstovich.